122-65-2

16

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884

No. ~~1110~~. ~~720~~ 407

THE KEHLOR MILLING COMPANY, PLAINTIFF IN ERROR,

vs.

THE JOHN T. NOYE MANUFACTURING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 17, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884

No. 1110.

THE KEHLOR MILLING COMPANY, PLAINTIFF IN ERROR,

vs.

THE JOHN T. NOYE MANUFACTURING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Writ of error	1	1
Placita	3	1
Bond for costs	4	2
Summons	5	2
Affidavit for attachment	7	3
Bond for attachment	8	4
Attachment writ	10	5
Declaration	13	6
Copy of account sued on	17	8
Affidavit of amount due	31	17
Rule on defendant to plead	33	18
Order setting cause and extending rule to plead	34	18
Pleas	34	19
Exhibit A—Account	51	26
Leave to defendant to file additional pleas	55	29
Additional pleas	55	29
Order setting cause for trial	61	32
Replications	62	32
Order postponing trial	70	36
Trial and continuance	70	36
Continuance of trial	71	37

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Continuance of trial	72	37
Trial concluded	73	37
Verdict and judgment for plaintiff	74	38
Motion for new trial	75	38
Reasons on motion for new trial	75	38
Order setting motion for new trial for hearing	76	39
Order overruling motion for new trial and allowing writ of error	77	39
Bill of exceptions	78	40
a—Testimony of Richard K. Noye	78	40
b—Agreement between John T. Noye & Sons and Kehlor Milling Co.	79	40
Bond on writ of error	80	41
Clerk's certificate	83	42
Citation and acknowledgement of service	84	42
Assignment of errors	85	43

1 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States within and for the southern district of Illinois, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court of the United States for the southern district of Illinois, before you, between The John T. Noye Manufacturing Company, plaintiff, and The Kehlor Milling Company, defendant, a manifest error happened to the great damage of the said defendant, The Kehlor Milling Company, as by its complaint appears:

We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being in-
2 spected, the said Supreme Court may cause further to be done
therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield, in said southern district of Illinois, this 20th day of June, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and eighth year.

[SEAL.] JNO. A. JONES,
Clerk Circuit Court of United States for the Southern District of Illinois.

[Endorsed:] Supreme Court of United States. The Kehlor Milling Company, plaintiff in error, *vs.* John T. Noye Manufacturing Company. Writ of Error.

3 *Placita.*

Pleas in the circuit court of the United States of America within and for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit of the United States, *pro tempore* sole judge of said court, on Saturday, the 8th day of March, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and eighth year.

J. A. JONES, *Clerk.*

JOHN T. NOYE MANUFACTURING COMPANY *vs.* KEHLOR MILLING COMPANY. } Assumpsit. No. 6536.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

The John T. Noye Manufacturing Company, a corporation organized and doing business under the laws of the State of New York, and a citizen of said State of New York, the plaintiff in this suit, puts in its place Azel F. Hatch, Esq., its attorney, against The 4 Kehlor Milling Company, a corporation organized and doing business under the laws of the State of Missouri, and a citizen of said last-named State, the defendant, in a plea of trespass on the case on promises.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, heretofore, to wit, on the 23d day of March, in the year of our Lord one thousand eight hundred and eighty-three, came the plaintiff in the foregoing entitled cause, by its attorneys, and filed in the office of the clerk of said court its bond for costs in said cause; which bond is in the words and figures following, to wit:

Bond for Costs.

CIRCUIT COURT UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

January Term, A. D. 1883.

THE JOHN T. NOYE MANUFACTURING CO. *vs.* THE KEHLOR MILLING CO. } In Assumpsit.

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 23rd day of March, 1883.

AZEL F. HATCH.

5 (Endorsed:) Filed March 23, A. D. 1883. J. A. Jones, clerk.

And thereupon, to wit, on the day last aforesaid (a præcipe for summons having been filed), there was issued out of said clerk's office in said cause a summons directed to the marshal of said district to execute, which summons and the "return" of said marshal thereto are in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

The United States of America to the marshal of the southern district of Illinois, Greeting:

We command you to summon The Kehlor Milling Company, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of June next, to answer unto The John T. Noye Manufacturing Company of a plea of assumpsit, to its damage, as it alleges, of fifteen thousand dollars, and have you then and there this writ.

6 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield, in said district, this twenty-third day of March, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred and seventh year.

[L. S.] J. A. JONES, *Clerk.*

Marshal's Return.

Served the within summons by delivering a copy of the same to Duncan M. Kehlor, vice-president of the Kehlor Milling Company, this 24th day of April, A. D. 1883.

JACOB WHEELER, *U. S. Marshal,*
By THOMAS L. FEKETE, *Deputy.*

(Endorsed:) Filed April 27, A. D. 1883. J. A. Jones, clerk.

And afterwards, to wit, on the 13th day of May, in the year last aforesaid (A. D. 1883), came the plaintiff, by its attorney, and filed in said clerk's office its affidavit for a writ of attachment in said cause, which said affidavit is in the words and figures following, to wit:

7 *Affidavit for Attachment.*

UNITED STATES OF AMERICA, }
Southern District of Illinois, } *ss:*

Richard K. Noye, president, of Buffalo, Erie county, New York being duly sworn says: That the Kehlor Milling Company, a corporation, is indebted to The John T. Noye Manufacturing Company, a corporation, after allowing all just credits and set-offs, in the sum of twelve thousand one hundred sixty-three dollars and ninety-five cents, upon an account stated for goods, wares, and merchandise sold and delivered, and for work and labor performed, and for the balance due and unpaid upon a contract for milling machinery sold and delivered to said The Kehlor Milling Company. That this deponent further states that the said The Kehlor Milling Company is not a resident of the State of Illinois, and that its place of residence is at St. Louis, in the State of Missouri.

RICH'D K. NOYE, *Pres't.*

Subscribed and sworn to before me, this fifth day of April, A. D. 1883.

[L. S.] A. B. KELLOGG,
Notary Public, Erie Co., N. Y.

(Endorsed:) Filed May 13th, A. D. 1883. J. A. Jones, clerk.

8 And afterwards, to wit, on the 14th day of May, in the year last aforesaid, came the plaintiff, by its attorney, and filed its attachment bond in said cause, which said attachment bond is in the words and figures following, to wit:

Attachment Bond.

Know all men by these presents, that we, The John T. Noye Manufacturing Company and Benjamin F. Gump and Lemuel D. Norton, are held and firmly bound unto The Kehlor Milling Company in the penal sum of twenty-four thousand four hundred dollars and —— cents, lawful money of the United States; for the payment of which said sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this twenty-fifth day of April, 1883.

The condition of the above obligation is such, that whereas the above bounden The John T. Noye Manufacturing Company has, on the day of the date hereof, prayed an attachment out of the circuit court of the United States for the southern district of Illinois, at the suit of Richard K. Noye, president of the John T. Noye Man'f'g Co., against the estate of the above-named The Kehlor Milling Company for the sum of twelve thousand one hundred and sixty-three
9 dollars and ninety-five cents, and the same being about to be sued out of said court, returnable on the first Monday of June, A. D. 1883, to the term of the said court then to be holden:

Now, if the said The John T. Noye Manufacturing Company shall prosecute its said suit with effect, or in case of failure therein shall well and truly pay and satisfy the said The Kehlor Milling Company all such costs in said suit and such damages as shall be awarded against the said The John T. Noye Manufacturing Company in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void; otherwise, to remain in full force and effect.

[SEAL.] RICH'D K. NOYE, *Pres't.* [L. S.]
BENJAMIN F. GUMP. [L. S.]
LEMUEL D. NORTON. [L. S.]

Signed, sealed, and delivered in presence of—
Witness to signature of Rich'd K. Noye, Pres't:
A. B. KELLOGG.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Lemuel D. Norton, the surety on the foregoing bond, this day appeared personally before me, and, upon being sworn by me, deposes and says that he is worth the sum of fifty thousand dollars over and above all proper liabilities.

LEMUEL D. NORTON.

10 Subscribed and sworn to before me, this 25th day of April, A. D. 1883.

WM. H. BRADLEY,
Clerk Cir. Court U. States for said District.

(Endorsed:) Filed May 14, A. D. 1883. J. A. Jones, cl'k.

And thereupon, to wit, on the day last aforesaid (May 14th, 1883), there was issued out of said clerk's office a writ of attachment in said cause, directed to the marshal of said district to execute, which said attachment writ and the "return" of said marshal thereto are in the words and figures following, to wit:

Attachment Writ.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Illinois,

The United States of America to the marshal of the southern district of Illinois, Greeting:

Whereas Richard K. Noye, president of The John T. Noye Manufacturing Company, hath complained that The Kehlor Milling Company is justly indebted to the said The John T. Noye Manufacturing Company to the amount of twelve thousand one hundred
11 and sixty-three $\frac{95}{100}$ dollars, and that The Kehlor Milling
Company is not a resident of the State of Illinois, and the said The John T. Noye Manufacturing Company having given bond and security according to law:

We therefore command you that you attach so much of the estate, real and personal, of the said The Kehlor Milling Company to be found in your district as shall be of value sufficient to satisfy the said debt and costs, according to the complaint. And such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon according to law before our judges of our circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof to be held at Springfield, in the county of Sangamon, upon the first Monday of June next, when and where you shall make known to the said court how you have executed this writ; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this fourteenth day of May, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred and seventh year.

[L. S.] J. A. JONES, *Clerk.*

12 *Marshal's Return.*

Rec'd this writ of attachment May 14, 1883, at 4 o'clock, p. m.

JACOB WHEELER, *U. S. M.*,
By J. N. REECE, *D'p'ty.*

By virtue of this writ of attachment I did, on this 14th day of May, 1883, levy upon the following described real estate as the property of said defendant, to wit: Lots 3, 4, 5, 6, 7, 8, 9, 10, and 11 of block 8 of Ferry's division of East St. Louis, in the county of St. Clair and State of Illinois.

JACOB WHEELER, *U. S. M.*,
By J. N. REECE, *D'p'ty.*

(Endorsed:) Filed June 6th, 1883. J. A. Jones, clerk.

And afterwards, to wit, on the 7th day of August, in the year last aforesaid (A. D. 1883), came the plaintiff, by its attorney, and filed in the office of the clerk of said court its declaration, with copy of account sued on thereto annexed, and also an affidavit of amount due; which declaration, copy of account, and affidavit are in the words and figures following, to wit:

13 *Declaration.*

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

In the Circuit Court of the United States for the Southern District of Illinois. July Term, A. D. 1883.

The John T. Noye Manufacturing Company, a corporation organized and doing business under the laws of the State of New York, and a citizen of the State of New York, plaintiff in this suit, by Azel F. Hatch, its attorney, complains of The Kehlor Milling Company, a corporation organized and doing business under the laws of the State of Missouri, and a citizen of the State of Missouri, defendant in the suit, summoned, etc., of a plea of trespass on the case on promises—

For that whereas the said defendant, heretofore, to wit, on the twenty-second day of March, in the year of our Lord one thousand eight hundred and eighty-two, at East St. Louis, Illinois, to wit, at the district aforesaid, became and was indebted to the said plaintiff in the sum of fifteen thousand dollars, of lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested. 14

And whereas, also, the said defendant afterwards, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiff avers that said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of fifteen thousand dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant, afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of fifteen thousand dollars, of like lawful money as aforesaid, for money before that time lent
15 and advanced by the said plaintiff to the said defendant, and
at the like request of the said defendant. And in the like sum for other money by the said plaintiff before that time paid, laid out and expended for the said defendant, and at the like request of the said defendant. And in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant, and at the like special request of the said defendant. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money, in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to
16 the said plaintiff, and then and there being in arrear and
unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of fifteen thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested. Nevertheless, the said defendant (although often requested, etc.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of fifteen thousand dollars, and therefore the said plaintiff brings suit, etc.

AZEL F. HATCH,
Plaintiff's Attorney.

Copy of Account sued on.

The Kehlor Milling Company, Dr.,
To The John T. Noye Manufacturing Company.

To goods, wares, and merchandise sold and delivered	$15,000
To money lent and advanced	$15,000
To money paid, laid out, and expended	$15,000
17 To money had and received to and for the use of said plaintiff	$15,000
To money due for interest and forbearance	$15,000
To labor, services, and material	$15,000
To balance due on account stated	$15,000

Copy of Account sued on.

The Kehlor Milling Company
To The John T. Noye Manufacturing Company, Dr.

1 9 x 30 double mill, 8c.
2 “ “ 10c.
2 “ “ 12c.
2 “ “ 16c.
2 “ “ 20c.
2 “ “ 24c.
6 “ “ smooth.
5 9 x 24 “ “ 32c.
3 5¼ wing guds, 1⅝ x 7.
3 miters, No. 8.
9 5¼ coupling guds.
9 5¾ stands.
3 5¼ tail guds.
1 7′ shaft, 1⅞ ; 1 collar.
1 miter, No. 12.
1 5¼ wing thimble.
2 5¼ coupe guds.
2 5¾ stands.
1 5¼ tail guds.
1 6′ shaft, 1⅞; 2 collars.
2 1⅞ x 4½ bracket boxes.
2 20 x 3½ pulleys.
1 8 x 4 pulley.
18 1 30 x 22 tight-ner, complete.
1 24 x 11 “ “
6 24 x 6½ pulleys.
1 8′ 9″ shaft, 2⅜; 2 collars.
1 bevel, No. 32; 60 T.
1 spur, No. 38.
3 24 x 7 el. pulleys.
3 20 x 7 el. foot pulleys.
1 11′ shaft, 2⅜; 2 collars.
1 spur, No. 38.
1 24 x 7 el. pulley.

1 20 x 7 el. foot pulley.
2 30 x 9 el. pulley-.
2 20 x 9 el. foot pulley-.
1 7′ 9″ shaft, $2\frac{1}{8}$; 2 collars.
1 spur, No. 36.
2 bevels, No. 64; 38 T.
2 bevels, No. 64; 45 T.
1 2′ shaft, $1\frac{7}{8}$; 2 collars.
1 spur, No. 38.
1 10″ shaft, $1\frac{7}{8}$; 2 collars.
2 24″ drop hangers.
1 15 x 7 pulley.
1 23 x 5 "
1 28 x 20 tightener, complete.
1 7′ 9″ shaft, $1\frac{7}{8}$; 2 collars.
1 spur, No. 36.
2 miters, No. 11.
2 $5\frac{1}{4}$ wing gud-, $1\frac{5}{8}$ x 7.
2 miters, No. 11.
2 $5\frac{1}{4}$ coupling gud-.
2 $5\frac{3}{4}$ stands.
19 1 $5\frac{1}{4}$ tail gud.
1 $5\frac{1}{4}$ wing gud, $1\frac{5}{8}$ x 7.
1 4 x 4 flange pulley.
1 10′ 10″ shaft, $2\frac{3}{8}$; 2 collars.
2 24″ drop hangers.
1 30 x $6\frac{1}{2}$ pulley.
1 15 x $8\frac{1}{2}$ "
1 9′ 10″ shaft, $1\frac{7}{8}$; 2 col.
3 24 drop hangers.
2 18 x $4\frac{1}{2}$ pulleys.
1 15 x $6\frac{1}{2}$ "
2 5 x 5 flange pulleys.
1 12′ 10″ shaft, $2\frac{1}{8}$.
1 10′ 9″ " $2\frac{3}{8}$; 2 collars.
1 pair $8\frac{1}{2}$ face couples.
1 miter, No. 20.
2 bevels, No. 16; 40 T.
1 Babbitt step, $2\frac{1}{4}$; upt. 4, 14.
1 15′ 7″ shaft, $3\frac{3}{8}$.
1 15′ 3″ " $2\frac{7}{8}$.
1 16′ " $2\frac{5}{8}$.
1 pair $9\frac{1}{2}$″ face couples.
1 " 10′ " "
1 bevel, No. 36; 58 T.
1 spur, No. 91.
1 24 x 7 el. pulley.
1 20 x 7 el. foot pulley.
4 24 x 6 el. pulley-.
4 20 x 6 el. foot pulleys.
5 24 x 6 el. pulleys.

5 20 x 6 el. foot pulleys.
10 24 x 6 el. pulleys.
20 10 20 x 6 el. foot pulleys.
1 10′ shaft, $2\frac{3}{8}$; 2 collars.
1 11′ shaft, $2\frac{3}{8}$.
1 13′ 6″ shaft, $2\frac{1}{8}$.
1 pair $8\frac{1}{2}$ face couples.
1 " 9 " "
1 spur, No. 91.
2 24 x 6 el. pulleys.
2 20 x 6 el. foot pulleys.
4 24 x 5 el. pulleys.
4 20 x 5 el. foot pulleys.
1 8′ 6″ shaft, $1\frac{7}{8}$; 2 collars.
2 miters, No. 12.
1 6′ 3″ shaft, $1\frac{7}{8}$; 2 collars.
1 miter, No. 12.
4 " No. 11.
2 $5\frac{1}{4}$ wing guds, $1\frac{5}{8}$ x 7.
6 $5\frac{1}{4}$ coup. guds.
6 $5\frac{3}{4}$ stands.
1 $5\frac{1}{4}$ tail gud.
44 hanging yokes for conveyors.
4 30 und. rem. S. G'd Iron France Mills, with drop brackets.
11 4 reel bolt chests, complete, double conveyors, reels, 18′ x 32″.
2 aspirators.
6 2 reel scalping chests, sing. cons. reels, 8′ x 30″.
1 No. 0 kurtle cockle separators.
2 rolling screens, iron reels, 16′ x 36″.
1 12′ shaft, $3\frac{3}{8}$.
1 14′ x 6″ shaft, $3\frac{3}{8}$.
21 1 14′ 6″ shaft, $2\frac{7}{8}$.
1 60 20 pulley.
5 34 x $16\frac{1}{2}$ pulleys.
1 36 x $6\frac{1}{2}$ "
4 24 x $4\frac{1}{2}$ "
1 36 x 11 "
1 41 x $6\frac{1}{2}$ "
1 19 x $4\frac{1}{2}$ "
1 pair 10″ face couples.
1 pair 11″ face couples.
1 24 x $4\frac{1}{2}$ pulley.
5 18 x $4\frac{1}{2}$ "
4 41 x $6\frac{1}{2}$ "
3 $3\frac{3}{8}$ x $8\frac{7}{8}$ bracket boxes.
2 $2\frac{7}{8}$ x 7.
1 13′ shaft, $6\frac{3}{8}$.
1 13′ " $3\frac{3}{8}$.
1 13′ 6″ " $3\frac{1}{8}$.
1 13′ 6″ " $2\frac{7}{8}$.
1 pair $10\frac{1}{2}$″ face couples.

1 " 10″ face couples.
1 120 x 32 pulley.
1 108 x 22 "
1 80 x 20 "
4 50 x 6½ "
4 25 x 4½ "
4 50 x 6½ "
5 25 x 4½ "
3 50 x 6½ "
2 25 x 4½ "
1 B. C. pinion, No. 45.
1 pair 11″ face couples.
22 2 6½ x 13 pillow boxes.
1 6½ x 10¼ " "
1 3⅜ x 8⅞ bracket box.
1 3⅛ x 8 " "
2 2⅞ x 8 " "
1 10′ 6″ shaft, 3½.
1 12′ " 3¼.
1 12′ " 3.
1 12′ " 2¾.
1 pair 10½″ face couples.
1 " 10″ " "
1 " 9½″ " "
1 miter, No. 5.
8 bevels, No. 20; 50 T.
6 11″ shaft, 1⅝; Babbit step.
6 Babbit steps.
12 miters, No. 2.
12 " No. 11.
12 9′ 6″ shaft, 1⅞; 24 col-ors.
24 scalper spiders.
12 miters, No. 11.
12 5½ oct. soc. guds, 1⅝ x 8.
12 5¼ wing tail guds.
6 bevels, No. 92; 50 T.
1 5′ 9″ shaft, 5″; 2 col.
3 2⅞ x 7 bracket boxes.
1 36 x 11 pulley.
4 30 x 7 "
12 miters, No. 2.
1 5′ 9″ shaft, 2½; 2 collars.
1 bevel, No. 10; 57 T.
1 miter, No. 20.
23 1 13′ 9″ shaft, 2½; 2 collars.
1 Bevel, No. 32; 32 T.
1 B. C. wheel, No. 51.
1 11′ 6″ shaft, 4″.
3 16′ " 3″.
3 pair 10″ face couples.
2 3⅞ x 10 pillow boxes.

1 30″ drop hangers, $3\frac{7}{8}$ x 8.
3 " " $2\frac{7}{8}$ x 7.
4 42 drop hangers, $2\frac{7}{8}$ x 7.
1 $2\frac{7}{8}$ x 8 bracket box.
1 B. C. pinion, No. 35.
1 84 x 22 pulley.
2 23 x 4 "
13 23 x 4 "
1 24 x 7 "
1 24 x 5 "
1 38 x 5 "
1 B. C. wheel, No. 68.
2 12′ 7″ shafts, $1\frac{3}{4}$.
2 17′ x 3 " 2″.
2 pairs $7\frac{1}{2}$ face couplings.
8 bevels, "C;" 38 T.
16 miters, No. 11.
2 bevels, No. 20; 60 T.
2 Bab. steps, $1\frac{7}{8}$.
6 12′ 6″ shaft, $1\frac{3}{4}$.
6 14′ " 2.
6 17′ 4″ " $2\frac{1}{4}$.
2 pairs $7\frac{1}{2}$″ face couples.
6 " 8″ "
6 Bab. steps.
24 36 bevels, "C;" 38 T.
72 miters, No. 11.
6 bevels, No. 20; 60 T.
1 15′ 4″ shaft, 4″; steel toe.
1 14′ " 4″.
1 pair 12″ face couples
1 copper-lined pot for 4″.
1 bevel, No. 10; 40 T.
1 B. C. wheel, No. 35; cogged.
1 B. C. pinion, No. 14.
1 bush box, $3\frac{7}{8}$.
1 $3\frac{7}{8}$ x 10 strap box.
1 16′ shaft, $2\frac{1}{2}$; steel toe.
1 14′ " $2\frac{1}{2}$.
1 14′ 6″ shaft, $2\frac{1}{2}$.
2 pairs 9″ face couples.
1 copper-lined trainpot.
2 34 x 6 pulley.
2 19 x 6 "
2 bush boxes, $2\frac{3}{8}$.
1 B. C. pinion, No. 68.
1 B. C. " No. 51.
1 $2\frac{3}{8}$ x 6 strap box.
1 14′ 6″ shaft, $4\frac{1}{2}$.
1 12′ 3″ " $3\frac{1}{2}$.
1 12′ 2″ " $3\frac{1}{2}$.

2 pairs 11″ face couples.
1 B. C. wheel, No. 14.
1 bevel, No. 36; 55 T.
1 miter, No. 5.
1 16′ shaft, 2½.
    1 14′ shaft, 2¼.
25 1 12′ 6″ shaft, 2¼.
    2 pair 8½″ face couples.
1 bevel, No. 16; 70 T.
2 “ No. 92; 40 T.
1 24 x 7 el. pulleys.
1 20 x 7 “ foot pulley.
2 24 x 7 “ pulleys.
5 24 x 7 “ “
5 20 x 7 “ foot pulleys.
4 bevels, No. 92; 40 T.
44 6½ wing guds, 1⅞ x 8.
44 bevels, “C;” 50 T.
44 6½ wing guds, 1⅞ x 4.
88 5¼ “ “ 1⅝ x 8.
88 miters, No. 11.
88 5¼ tail guds, 1⅝ x 4.
88 5¼ coupe guds.
88 5¾ stands.
44 iron bridge trees for reels.
22 “ “ “ “ cons.
44 hanging yokes for lower cons.
44 yokes.
88 bolt chest brackets.
1 40 x 32 tightener, complete.
1 3⅞ x 10 strap box.
1 2⅜ x 6 “ “
3 square platforms flour scales for packers.
24 mill picks.
1 3½ proof staff.
1 6½ point staff.
    16 No. 3 Smith purifiers.
26 16 No. 2 dust collectors.
    2 No. 3 “ “
2 No. 28 Sturdevant’s fans.
1 3⅜ x 12 pillow box.
2 pick holders.
200 lineal ft. of 1⅞ half round black walnut, moulded.
200 lineal feet of ⅞ do. do.
100 lineal ft. of ⅝ pine cool.
100 “ “ “ ⅝ black walnut cool.
1,000 yds. dust room cloth.
575 cast mashers.
2 20 x 6 el. foot pulleys.
2 20 x 5 “ “ “
1 32 x 7 pulley.

1 B. C. wheel, No. 64.
40 15′ shaft, $1\frac{7}{16}$; hot. R.; 4 collars.
1 14′ 6″ " " " "
40 pairs 7″ face couples.
1 24 x 7 pulley.
2 24 x 6 "
16 12 x $2\frac{1}{2}$ "
1 9′ 9″ shaft, $1\frac{7}{16}$.
1 5′ 9″ " $1\frac{7}{8}$; 2 collars.
2 $1\frac{5}{8}$ x $4\frac{1}{2}$ bracket boxes.
1 32 x 5 pulleys.
1 B. C. pinion, No. 64.
1 7′ shaft, $1\frac{5}{8}$; 2 collars.
2 $1\frac{5}{8}$ x 4 bracket boxes.
1 20′ face centre (for rolling screen).
1 6 x 5 pulley.
2 No. 3 fir. centrifugal bolt reels.
27 3,100 feet of $5\frac{1}{2}$″ leather belt.
1,266 " $6\frac{1}{2}$ "
307 feet of $8\frac{1}{2}$ leather belt.
400 " $4\frac{1}{2}$ "
99 " 30″ " double.
$112\frac{2}{3}$ " 20 "
$49\frac{1}{3}$ " 18 "
38 " 10 "
1,000 " $6\frac{1}{2}$ " light double.
1,001 " 4 " single.
250 " 6″ " "
100 " $5\frac{1}{2}$ " "
50 " $6\frac{1}{2}$ " "
200 " $4\frac{1}{2}$ " "
513 " $3\frac{1}{2}$ " "
104 " 3″ " "
100 " 8″ " "
202 " $2\frac{1}{2}$ " "
103 " $1\frac{1}{2}$ " "
6 sides lace leather.
9,000 el. bolts.
175 8″ el. cups.
2,600 5″ "
1,050 6″ "
350 4″ "
60 po. 2 x 12, 16 long dressed.
25 " 2 x 16, 16 "
4 maple planks, 2 x 12.
100 ps. maple, 2 x 2, 6″ long.
20 maple boxes, $1\frac{7}{8}$.
15 " $2\frac{1}{8}$.
25 maple boxes, $2\frac{3}{8}$.
28 8 " $2\frac{5}{8}$.
5 " , $2\frac{7}{8}$.

2 maple boxes, $3\frac{1}{8}$.
10 " $3\frac{3}{8}$.
3 " $4\frac{3}{8}$.
10 " $2\frac{1}{8}$.
10 " $1\frac{5}{8}$.
1 miter, No. 11.
1 real bridge tree.
2 spur wheels, No. 41.
10 miters " No. 11.
2 bevees " No. 64.
1 18 x $7\frac{1}{2}$ tightener pulley.
202 feet of 4″ short-lap belt.
195 1 x 18″ of 4″ wire.
2 8′ 10″ shafts, $2\frac{1}{8}$.
2 8′ 6″ " $9\frac{1}{8}$.
2 pipe couplings.
2 bevels, No. 64; 45 T.
8 36 No. spiders.
48 ft. of No. 54 brass wire, 18″ wide.
144 " No. 16 wire, 15 wide.
100 " No. 18 " "
125 " No. 20 " "
99 " No. 22 " "
94 " No. 24 " "
2 24 x 5 el. pulleys.
1 24 x 6 "
6 bolt chest-brackets.
1 $2\frac{7}{8}$ collars.
12 bolt chests' yokes, $1\frac{5}{8}$.
4 $5\frac{1}{4}$ wing guds, $1\frac{5}{8}$ x $7\frac{1}{2}$.
29 4 $5\frac{1}{4}$ wing tail guds.
4 $5\frac{1}{4}$ " coup'l "
4 $5\frac{1}{4}$ stands.
1 14 x 4 pulley.
$73\frac{10}{12}$ ft. of 12″ cold con.
15 pairs brackets.
3 hours.
1 16′ pulley, 32″ face.
7,000 $2\frac{1}{2}$ conveyor floats.
4 $5\frac{1}{4}$ wing guds, $1\frac{5}{8}$ x 8.
4 $5\frac{1}{4}$ " tail guds.
4 $5\frac{1}{4}$ " cop. "
4 $5\frac{3}{4}$ stands.
125 keys for gudgeons.
300 " " "
Ctgon 1 16 ft. pulley.
44 bolting cloths.
4 pairs 22 x 53 T gears.
4 6″ overhanging feed roll pulleys.
1 france for jack for slow roll.
28 pairs 22 x 53 T gears & hoods.

12 pairs 30 x 45 T gears & hoods.
40 offset hub pulleys.

Less machinery returned as follows:

39 20 x 5 pulleys.
23 12′ jacks.
44 12′ feed pulleys.
3,775 2½ x 2½ floats.
500 1¾ x 1¾.
1 spur wheel, No. 37.
        2 miter wheels, No. 12.
30   2 miter wheels, No. 8.
        2 bevels " No. 64; 38 T.
2 bush boxes, Babbit followers.
3 yokes for iron bridge trees.
6 " " wood "
16 24 x 4½ pulleys.
1 24 x 4 "
3 18 x 4½ "
1 19 x 4½ "
1 24 x 6½ "
2 20 x 5 foot "
310 ft. of 3½″ leather belt.
39 20 x 5 pulleys.
23 12 jacks.
44 12″ feed pulleys.

48,500 00

Above as per contract.

1882.

Dec. 1st.	1 shaft 21′ x 2⅞″ @ 85	38 85	
	2 pairs 2⅞ face couples	31	
	1 2⅞ set screen collars	1 85	
	3 post bracket boxes	27	
		98 70	
	25 & 10 per cent.	32 08	
			66 62
	1 shaft 8′ 6″ x 2⅜″	11 05	
	1 pair 2⅜ face couples	12	
	1 24 x 6½ pulley	8	
	1 2⅜ set screw collars	1 30	
		32 35	
	25 per cent. & 10 per cent.	10 51	
			21 84

Above for changing location of packers.

1882.				
Dec.	1st.	4 kegs nails, 10 to 40 ds.	----	16
		8 days' labor on engine foundation, 3.50	----	28 00
				48,632 46
31		Forward	48,632 46	
		13½ days' labor dressing and placing supporting parts under main upright belt, 3.50	47 25	
		8½ days' labor relining shafting, 3.50	29 75	
		2½ days' leveling and planing floor in basement	8 75	
		Services and expenses of McElroy	300	
'83.				
Jan'y	23.	4 pairs 30 x 45 T-gears, cast, 8	32	
		4 " 22 x 53 " " 8	32	
		4 spiral springs, 50	2	
				49,084 21

CREDITS.

July	28.	Cash	10,000	
Aug.	21.	"	10,000	
Nov.	29.	" paid J. S. Karns at mill	15,830	
Dec.	20.	" " McElroy	200	
Jan.	12.	" " Todd & Co.	890 26	
				36,920 26
				12,163 95

(Endorsed:) Filed August 7th, A. D. 1883. J. A. Jones, clerk.

Affidavit of Amount Due.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

32 THE JOHN T. NOYE MANUFACTURING COMPANY
vs.
THE KEHLOR MILLING COMPANY.

Richard K. Noye, being duly sworn, deposes and says: That he is the president of the John T. Noye Manufacturing Company, a corporation organized and doing business under the laws of the State of New York, plaintiff in this cause, and that the demand of said plaintiff in the above-entitled cause is for the price and value of machinery, goods, wares, and merchandise sold and delivered by said plaintiff to said defendant, and for the price and value of work done and material for the same provided by the said plaintiff for said defendant, and at the special request of said defendant, and that there is due to the plaintiff from the defendant, after allowing to said defendant all just credits, deductions, and set-offs, the sum of twelve thousand and ninety-seven dollars and ninety-five cents, with interest thereon at the rate of six per centum per annum from December eighth, A. D. 1882, and the further sum of sixty-six dollars, with interest thereon at the rate of six per centum per annum from January fourth, A. D. 1883.

RICH'D K. NOYE.

Subscribed and sworn to before me, this 4th day of August, A. D. 1883.

[SEAL.]

J. E. EWELL,
Clerk of Supreme Court.

33 (Endorsed:) Filed August 7, A. D. 1883. J. A. Jones, clerk.

And afterwards, to wit, on Monday, the 7th day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-four, the following proceedings were had in said court in said cause and entered of record, to wit:

Rule on Defendant to Plead, &c.

JOHN T. NOYE MANUFAC-URING COMPANY
vs. } 6536. Assumpsit.
KEHLOR MILLING COMPANY.

By consent of parties, by their attorneys, the defendant is ruled to plead herein by the 14th day of January inst., and this cause is set for hearing on the 18th day of February next.

And afterwards, to wit, on Monday, the 14th day of January, at the January term of court aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

34 *Order Setting Cause and Extending Rule to Plead.*

JOHN T. NOYE MANUFACTURING COMPANY
vs. } 6536. Assumpsit.
KEHLOR MILLING COMPANY.

By consent of parties, by their attorneys, this cause is set for hearing on the 18th day of February next, and the rule on defendant to plead herein extended to the 21st day of January inst.

And afterwards, to wit, on the 16th day of January, in the year last aforesaid, came the defendant, by its attorney, and filed in said clerk's office its pleas in said cause, which pleas are in the words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA, } *ss:*
State of Illinois, }

United States Circuit Court, Southern District of Illinois. January Term, A. D. 1884.

THE KEHLOR MILLING COMPANY
ats. } Assumpsit.
THE JOHN T. NOYE MANUFACTURING COMPANY.

And the defendant, by J. E. McKeighan, its attorney, comes and defends the wrong and injury, when, &c., and says that it did
35 not promise in manner and form as the plaintiff has above thereof complained against it, and of this it puts itself upon the country, etc.

THE KEHLOR MILLING CO.,
By J. E. McKEIGHAN, *Its Att'y.*

And for further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the several supposed causes of action in the said declaration mentioned are one and the same and not different causes of action; and that heretofore to wit, on the 12th day of April, A. D. 1882, the plaintiff was engaged in the business of manfacturing mill machinery and placing the same in mills, and in manufacturing and furnishing machinery and material and building and constructing mills for the manufacture of flour and other products from wheat and other grains; and the defendant was desirous of having furnished for it all the machinery and material for the building, constructing, and fully equipping of a mill for the manufacture of flour and other products from wheat and other grain, and at, to wit, the district aforesaid, in consideration that the defendant would buy of the plaintiff at its request all the mill machinery and material necessary for the building and equipping of defendant's mill, except the mill-house and steam-power, bran-duster, receiving-separator, milling-separators, packers, and one rail-
36 road track scale, and would engage and employ the plaintiff to place the same in position in defendant's mill-house and mill, then being constructed, at the price of forty-eight thousand and five hundred dollars, the plaintiff promised and guaranteed to it, the defendant, that the said mill should be completed by the 1st day of August, 1882; that both the material and workmanship should be first-class in every particular, and that said machinery and mill, when completed by the said plaintiff for the said defendant, should combine all the latest improvements, and should be delivered to defendant in satisfactory running condition; that it should have a capacity, when constructed by plaintiff, to produce six hundred barrels of flour per day, from new wheat; that such product should be a first-class grade in quality; that of such product there should be at least twenty-five to thirty per cent. of patent flour, equal in grade to any patent flour made in St. Louis or vicinity; that of said

product twelve per cent. should be of low-grade flour, seven to ten per cent. of which should grade as family flour, and the balance of said low grade extra St. Louis inspection; that the balance of said product of one hundred per cent. should be bakers' flour of a quality in grade equal to any bakers' flour made in St. Louis, or in that section of country, and that the yield of flour which it should
37 produce should be equal to the yield of any roller mill, and should not be less than one barrel of flour for each and every four bushels and thirty pounds of wheat used in its manufacture; and thereupon the defendant, confiding in the said promises, and relying upon the said guarantees, then and there bought of the said plaintiff all the mill machinery and material necessary for the building and equipping of said mill, except the mill-house, steam-power, bran-dusters, receiving-separator, one milling-separator, packers, and one railroad track scale, and employed the plaintiff to construct said mill, set up and put all the said machinery in position in the defendant's mill-house and mill at and for the price of forty-eight thousand and five hundred dollars aforesaid, and upon the sole consideration of said promises and guarantees, and of the sale of the said mill machinery and materials, and of the placing of the same in position, and setting the same up as aforesaid, the defendant has paid to the plaintiff the sum of, to wit, forty thousand dollars, parcel of the said price. Yet the said plaintiff did not regard its said promises and guarantees, but thereby deceived aud defrauded the defendant in this, to wit: That the said plaintiff did not complete said mill by the 1st day of August, 1882, but that the same was never by the said plaintiff completed according to said agreement; that the machinery, material, and workmanship furnished and done
38 by the said plaintiff to and for the said defendant was not first class in every particular, but was inferior and insufficient quality; that said machinery and mill, as constructed, furnished, and placed in position by plaintiff, did not combine all the latest improvements, and was not delivered to defendants in a satisfactory running condition, but contained only part of the latest improvements, and such part were of inferior quality, and all the machinery necessary for said mill was not supplied by plaintiff, and the said mill was not delivered to defendant in condition to be profitably or successfully run at all.

That said mill did not have a capacity to produce six hundred barrels of flour per day from new wheat, but it had only a capacity, to wit, one hundred barrels of flour per day. That the product of said mill was not first class in quality, but that the quality of the product was very inferior.

That of the product of said mill there was not at least twenty-five to thirty per cent. of patent flour equal in grade to any patent flour made in St. Louis or vicinity, but that the amount of patent flour did not and would not exceed, to wit, one per cent., and of inferior quality to that manfactured in St. Louis and vicinity; that of said product twelve per cent. was not low-grade flour, and seven to ten per cent. of same would not grade as family flour. That the
39 balance of the low-grade flour would not grade extra St.

Louis inspection, but the balance of said low grade was of a grade far inferior to the grade of extra St. Louis inspection. That the balance of the product of the one hundred per cent. bakers' flour was not of a quality equal in grade to any bakers' flour made in St. Louis or vicinity, but was inferior in quality. That the yield of flour which said mill could be made to produce was not as good or as great and was not equal to the yield of any roller-mill. That the said mill would not yield one barrel of flour for each and every four bushels and thirty pounds of wheat, but that it required a much larger quantity of wheat to produce one barrel of flour by said mill, to wit, the quantity of six bushels of wheat for each and every one barrel of flour.

That after the said plaintiffs ceased to work upon the said machinery and mill, and abandoned the same to defendant, said mill would not run and manufacture flour by reason of defects in said machinery and its construction for a long space of time, to wit, the space of one year, and the said defendant was compelled to expend and did expend divers large sums of money amounting to the sum of, to wit, fifteen thousand dollars, for new machinery and repairs and improvements, in order to put the said mill in running order and in condition to manufacture flour in quantity and quality as specified in said contract or agreement made between plaintiff
and defendant, and was deprived of the use of said mill dur-
40 ing the whole of said time, and thereby sustained great loss,
to wit, to the amount of two thousand dollars; and defendant sustained great loss and damage by reason of the imperfect manner in which said mill operated, while it operated the same prior to and during the time defendant was making said improvements and repairs; in this, that the said mill produced inferior product, and it required more wheat and cost more money to operate it by reason of the said defects in machinery, material, and construction than it otherwise would, whereby defendant sustained great loss, to the amount of, to wit, the sum of fifteen thousand dollars; and said mill and machinery, by reason of said breaches in said agreement, was greatly depreciated in value, to wit, in the sum of twenty-five thousand dollars.

Defendant says that the matters and things herein set forth arose out of the supposed cause of action set forth in plaintiff's declaration.

And this the defendant is ready to verify.

Wherefore it prays judgment, &c., and that the same may be recouped and set off against the demands of the plaintiff herein.

THE KEHLOR MILLING CO.,
By J. E. McKEIGHAN, *Its Att'y.*

And for other and further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it,
the defendant, because it says that the several supposed
41 causes of action in the said declaration mentioned are one
and the same, and not different causes of action; and that heretofore, to wit, on the 12th day of April, A. D. 1882, at the district

aforesaid, in consideration that the defendant would buy of the plaintiff at its request all mill machinery, appliances, and materials necessary for the building and equipping of a mill, except the cleaning machinery, packers, one railroad track scale, and steam-engine, for the grinding and manufacturing of flour and other products from wheat and other grain, and would engage and employ the plaintiff to place the same, and the said cleaning machinery, packers, and said railroad track scale furnished by defendant, in position in defendant's mill house and mill at the price of forty-eight thousand and five hundred dollars, the plaintiff promised, guaranteed, and warranted to it, the defendant, that the said mill should be completed by the 1st day of August, A. D. 1882; that it should have the capacity to manufacture six hundred barrels of flour from new wheat each and every day; that the machinery, material, and workmanship, furnished by said plaintiff, should be first-class machinery, material, and workmanship in every respect, and that it should combine all the latest improvements; that the product of said mill should be a first-class grade in quality; that said mill should be completed and delivered to defendant in satisfactory running
42 condition; and thereupon the defendant, confiding in the said promises, and relying upon the said guaranties and warranties, then and there bought of the said plaintiff the said certain mill, machinery, and materials, and engaged and employed the plaintiff to construct said mill, set up and put the same in position in the defendant's mill house and mill at and for the price of forty-eight thousand and five hundred dollars. And upon the sole consideration of the same promises, guaranties, and warranties, and of the sale of the said mill, machinery, appliances, and materials, and of the placing of the same in position and setting the same up as aforesaid, the defendant has paid to the plaintiff the sum of, to wit, forty thousand dollars.

Yet the said plaintiff did not regard its said promises, guaranties, and warranties, but thereby deceived and defrauded the defendant in this, to wit, that the said plaintiff did not complete the said mill by the 1st day of August, 1882, but that the same was never by the said plaintiff completed according to the terms of the said contract; that the machinery, material, and workmanship was not first class in every particular, but was of insufficient and inferior quality, neither was all necessary macinery and appliances furnished by plaintiff; that said mill machinery, material, and mill as constructed and placed in position and set up by plaintiff did not combine all the latest improvements, and was not delivered to the defendant in satisfactory running condition; that said mill did not have
43 a capacity to produce six hundred barrels of flour from new wheat per day, but that it had only the capacity to produce, to wit, one hundred barrels of flour per day from new wheat; that the product of said mill was not first class in grade and quality, but was inferior in both grade and quality, and also in quantity produced; that by reason of the faulty construction of said mill, defects in machinery, and machinery not furnished, the want of capacity and the quality of the machinery and material used by

plaintiff in constructing said mill, and on account of the improper manner in which the said mill was constructed and the machinery placed in position and set up by plaintiffs, the mill would not run and successfully manufacture flour as guaranteed for a long space of time, to wit, for the space of one year, and the defendant was compelled to expend and did expend divers large sums of money, amounting to the sum of, to wit, fifteen thousand dollars, for new machinery and repairs and improvements, in order to put the said mill in running condition so it could be made to manufacture flour in quantity and quality as specified in said contract or agreement, and was deprived of the use of said mill during the whole of said time and thereby sustained great loss, to wit, ten thousand dollars; and defendant sustained great loss and damage by reason of the imperfect manner in which said mill operated while the defendant operated the same prior to and during the time of making
44 said repairs and improvements, in this: that during that time said mill produced inferior product, and it required more wheat and cost more money to operate it by reason of the said defects in machinery, material, and construction than it otherwise would, whereby defendant sustained great loss to the amount of, to wit, fifteen thousand dollars. And said mill and machinery was, by reason of said breaches in said agreement, greatly depreciated in value, to wit, in the sum of twenty-five thousand dollars.

Defendant says that the matters and things set forth herein arose out of the supposed cause of action mentioned in plaintiff's declaration.

And this the defendant is ready to verify.

Wherefore it prays judgment, &c., and that the same be recouped and set off against the demands of the plaintiff herein.

THE KEHLOR MILLING CO.,
By J. E. McKEIGHAN, *Its Att'y.*

And for other and further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the several supposed causes of action in the said declaration mentioned are one and the same cause of action and not different causes of action; and that on, to wit, the 12th day of April, 1882, the plaintiff, at and in the said district, sold the defendant all the mill machinery, appliances, and materials, saving cleaning machinery, packers, one railroad track
45 scale and steam-engine, for the erection and construction of a mill for the manufacture of flour and other products from wheat, and agreed to construct and place all the machinery and appliances requisite or necessary for said purpose in said mill, except said steam-engine, at and for the price of forty-eight thousand and five hundred dollars, and promised, guaranteed, and warranted the said mill, machinery, materials, and work to be first class in every respect; that it should combine all the latest improvements; that the said mill should be so built and constructed and the said machinery and appliances be so placed in position that the said mill when completed should have a capacity to produce six hundred

barrels — of barrel of new wheat of a first-class grade in quality, and that of said product there should be at least twenty-five to thirty per cent. of patent flour equal in grade to any patent flour made in St. Louis or vicinity, twelve per cent. of low grade flour, seven to ten per cent. of which low grade should grade as family flour, and the balance of the said low grade should grade extra St. Louis inspection; that the balance of said flour so manufactured should be bakers' flour of a quality in grade equal to any bakers' flour made in St. Louis or vicinity; that the yield of flour which said mill should produce when so built, constructed, and completed should be equal to the yield of any roller mill, and not less than one barrel of flour for every four bushels and thirty pounds
46 of wheat used in its manufacture. Thereupon the defendant, upon the sole consideration of said sale, agreement, promise, and warranty thereafter and before the commencement of this suit paid to the plaintiff a large sum of money, to wit, forty thousand dollars, parcel of the price aforesaid, and made the promise in said declaration contained to secure the payment of the residue of said price.

Said defendant says that said mill, machinery, and materials furnished by plaintiff and the work done were not first class in every respect, and did not combine all the latest improvements; that sufficient machinery was not furnished by plaintiff; that said mill was not so built and constructed, and the mill machinery and appliances so placed in position as to have a capacity to produce six hundred barrels of flour of new wheat of a first grade in quality; that said mill was not so constructed and built and said machinery and appliances so placed in position that of the product manufactured by the same there was not twenty to thirty per cent. of patent flour equal in grade to any patent flour made in St. Louis or vicinity, nor was twelve per cent. of the same low grade flour, nor did seven to ten per cent. of said low grade flour grade extra St. Louis inspection; nor was the balance of said flour manufactured by said mill of a quality in grade equal to any bakers'
47 flour made in St. Louis or vicinity, nor was the yield of said flour so produced equal to the yield of any roller mill; and said mill would not, when built by plaintiff under said agreement, produce one barrel of flour for every four bushels and thirty pounds of wheat, but, on the contrary, the machinery and materials supplied by plaintiff were of inferior quality and greatly defective and unfit for the purposes contemplated; that sufficient machinery was not furnished by plaintiff, and the work performed by plaintiff was unskilfully done. The mill, when built by plaintiff, could only produce, to wit, one hundred barrels of flour per day of new wheat, of an inferior grade, and the grade of the flour was far inferior in every particular specified in said agreement, and the best yield of flour which said mill would produce was only, to wit, one barrel of flour for every six bushels of wheat; whereby the said mill, mill machinery, materials, appliances, and work done in erecting and constructing said mill became and was of small value or use to defendant, to wit, of the value of one thousand dollars.

And so the defendant says that the consideration upon which the said promise was made has wholly failed as to the balance sued for by plaintiff; and this the defendant is ready to verify.

Wherefore it prays judgment, &c.

THE KEHLOR MILLING CO., *Def't,*
By J. E. McKEIGHAN, *Its Att'y.*

48 And for other and further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the several supposed causes of action in the said declaration mentioned are one and the same cause of action, and not different causes of action; and that on, to wit, the 12th day of April, 1882, the plaintiff, at and in said district, sold to the defendant certain mill machinery and materials for the erection and construction of a mill for the manufacture of flour and other products from wheat, and agreed to construct and place the same in position in defendant's mill at and for the price of forty-eight thousand and five hundred dollars, and warranted the said mill machinery and materials and the said work of putting the same in position to be first-class in every respect; that it should combine all the latest improvements; that it should be so built and constructed that its product should be first-class grade in quality; that the mill should be so erected, built, and constructed as to have a capacity of six hundred barrels of flour, new wheat, per day, working upon new wheat; and that thereupon the defendant, upon sole consideration of said sale and agreement and warranty, and before the commencement of this suit, paid to the plaintiff a large sum of money, to wit, forty thousand dollars, parcel of the price aforesaid,
and made the said promises in the said declaration mentioned
49 to secure the payment of the residue of the said price, and that
said mill machinery and material, and said work in placing the same in position in defendant's mill, was not at the time first class in every respect; that it did not at the time combine all the latest impovements; that said mill was not so erected, built, and constructed that the product thereof was first-class grade in quality, and that said mill was not so built and constructed as to have the capacity of manufacturing six hundred barrels of flour per day, working new wheat, but on the contrary the said machinery and material and work of putting the same in position were unfit for the purposes of manufacturing flour and other products from wheat and could not be successfully used for that purpose; whereby the said mill machinery, material, and work of putting the same in position became and was of small use or value to the defendant, to wit, of the value of one thousand dollars.

And so the defendant says that the consideration upon which the said promise was made has wholly failed as to the said balance sued for; and this the defendant is ready to verify.

Wherefore it prays judgment, &c.

THE KEHLOR MILLING COMPANY, *Def't,*
By J. E. McKEIGHAN, *Its Att'y.*

And for other and further plea in this behalf the defendant says
that the plaintiff ought not to have its aforesaid action against it, the
defendant, because it says that the plaintiff was before and at
50 the time of the commencement of this suit and still is indebted
to it, the defendant, in the sum of ten thousand dollars,
for goods, chattels, and effects before that time sold and delivered by
the defendant to the plaintiff at its request; and in the sum of ten
thousand dollars for goods, chattels, and effects before that time
bargained and sold by the defendant to the plaintiff at its request;
and in the sum of ten thousand dollars for work and services before
that time done and bestowed, and materials furnished by the defendant
for the plaintiff at its request; and in a like sum for money before
that time lent by the defendant to the plaintiff at its request;
and in the sum of ten thousand dollars for money before that time
paid out and expended by the defendant for the use of the plaintiff
at its request; and in the sum of ten thousand dollars for money
before that time received by the plaintiff to and for the use of the
defendant; and in the sum of ten thousand dollars for interest on
divers sums of money before then forborne by the defendant to the
plaintiff for divers long spaces of time before then elapsed; which
said sums of money so due from the plaintiff to the defendant as
aforesaid exceed the damages sustained by the plaintiff by reason of
the non-performance by the defendant of the several supposed promises
in the said delaration mentioned, and out of which said sums of
money the defendant is ready and willing and hereby offers
51 to set off and allow to the plaintiff such damages as he may
prove under the issues herein. And this the defendant is
ready to verify.

Wherefore it prays judgment, &c.

THE KEHLOR MILLING CO., *Def't.*
By J. E. McKEIGHAN, *Its Att'y.*

EXHIBIT "A" TO PLEAS.

Copy of Account, Marked Exhibit "A."

Sums Paid & for Ac. of Jno. T. Noye M'f'g Co.

1882.				
June	10.	To cash, freight & transfer	112 10	
	12.	" " "	26 00	
	14.	" " "	42 00	
	15.	" " "	26 00	
	19.	" " J. S. Karns	----	250 00
	"	" " sundries	4 00	
	27.	" " freight	12 00	
	28.	" " "	30 00	
	29.	" " "	18 99	
	"	" " "	30 00	
	30.	" " "	21 70	
July	6.	" " Blossom & Co., ins.	251 01	
	9.	" " J. S. Karns	----	100 00

1882.				
July	12.	To cash, freight	11 00	
	15.	“ “ “	8 50	
	17.	“ “ J. S. Karns	----	100 00
	18.	“ “ Wason & Sanders	46 75	
	“	“ “ J. S. Karns	----	50 00
	19.	“ “ freight	60 00	
	21.	“ “ “	30 00	
	“	“ “ J. S. Karns	----	300 00
	25.	“ “ dr'tf J. T. N. Co'y	----	10,000 00
			730 05	10,800 00

52

		Bro't forw'd	730 05	10,800 00
July	29.	To cash, J. S. Karns	----	800 00
Aug.	5.	“ “ do.	----	1,400 00
	7.	“ “ freight	30 00	
	“	“ “ “	16 00	
	13.	“ “ J. S. Karns	----	1,200 00
	14.	“ “ freight	30 00	
	“	“ “ J. S. Karns	----	800 00
	15.	“ “ freight	100 00	
	19.	“ “ J. S. Karns	----	1,000 00
	24.	“ “ freight	30 00	
	26.	“ “ “	3 65	
	“	“ “ “	27 00	
	“	“ “ J. S. Karns	----	1,000 00
Sept.	2.	“ “ do.	----	1,000 00
(Aug't 21.)		“ “ draft J. T. N. M. Co.	----	10,000 00
	6.	“ “ J. S. Karns	----	100 00
	9.	“ “ freight	9 81	
	“	“ “ “	11 50	
	“	“ “ Geo. Burridge	----	1,000 00
	12.	“ “ insurance	250 00	
	“	“ “ freight	18 01	
	16.	“ “ Geo. Burridge	----	700 00
	18.	“ “ freight act.	7 70	
	23.	“ “ Geo. Burridge	----	700 00
	“	“ “ St. Louis Trans. Co.	70	
	30.	“ “ Geo. Burridge	----	300 00
Oct.	5.	“ “ freight	42 00	
	7.	“ “ J. S. Karns	----	1,000 00
	11.	“ “ do.	----	2,000 00
	14.	“ “ do.	----	300 00
	21.	“ “ do.	----	400 00
			1,306 42	34,500 00

53

1882.		Bro't for'd	1,306 42	34,500 00
Oct.	18.	To cash, Geo. Burridge	----	210 00

1882.						
Oct.	30.	"	"	wages for mill	166 15	
Nov.	1.	"	"	freight transfer	4 20	
	"	"	"	Devlin iron bill	6 00	
	4.	"	"	George Burridge	----	170 00
	"	"	"	wages for mill	453 70	
	7.	"	"	clothing reels	25 90	
	11.	"	"	Geo. Burridge	----	200 00
	"	"	"	wages for mill	254 90	
	18.	"	"	help, assist. Mr. Elroy	59 37	
	20.	"	"	Geo. Burridge	----	150 00
	"	"	"	wages for mill	186 18	
	23.	"	"	Mr. Elroy	----	200 00
	25.	"	"	J. S. Karns	----	100 00
	27.	"	"	wages for mill	279 95	
Dec'r	2.	"	"	J. S. Karns	----	200 00
	4.	"	"	wages for mill	294 70	
	5.	"	"	J. S. Karns	----	300 00
	6.	"	"	insurance	93 75	
	9.	"	"	wages for mill	403 35	
	16.	"	"	pipe for steamer	35 00	
	"	"	"	freight	24 00	
Jan'y	3.	"	"	oils	46 08	
	"	"	"	hardware	13 42	
	"	"	"	Schaub	24 24	
	"	"	"	G. & W. Todd & Co.	200 04	
	"	"	"	tin smith	12 40	
	"	"	"	Kneuffel & Plass	40 00	
	8.	"	"	J. T. N. Co'y, deft.	----	890 26
	14.	"	"	freight	8 39	
	16.	"	"	Hudlow, wire	1 25	
					3,939 39	36,920 26

54

1883.				Bro't forw'd	3,939 39	36,920 26
Jan'y	18.	To cash,		domestic	3 20	
Feb'y	1.	"	"	D. J. Follip's bill for borrowed material	212 84	
	13.	To cash,		tinsmith	13 10	
	12.	"	"	M., B. & N. M'f'g Co.	80	
	15.	"	"	St. L. Ry. Supply Co.	6 00	
	16.	"	"	freight on gear	2 25	
	20.	"	"	Todd & Stanley Co'y	233 90	
	22.	"	"	Rubleman H. Bill	10 50	
	"	"	"	do.	4 00	
	"	"	"	lumber	94 10	
M'ch	6.	"	"	Todd & Stanley Co'y	102 96	
	8.	"	"	do.	1 65	
	"	"	"	Dan Devlin bill	53 36	
	"	"	"	ex. chg's on springs	50	

1883.						
M'ch	15.	"	"	Moran B. & N. W. Co.	8 00	
Ap'l	5.	"	"	Todd & Stanley	63 80	
	9.	"	"	do.	23 98	
	14.	"	"	Foreman & Sellars	29 20	
	"	"	"	Todd & Stanley	2 25	
	24.	"	"	do.	23 97	
June	23.	"	"	do.	18 35	
					4,848 10	36,920 26
						4,848 10
						41,768 36

(Endorsed:) Filed January 16, 1884. J. A. Jones, clerk.

55 And afterwards, to wit, on Saturday, the 9th day of February, at the January term of court aforesaid (A. D. 1884), the following further proceedings were had in said court in said cause, and entered of record, to wit:

Leave to Def't to File Add'l Pleas.

John T. Noye Manufacturing Company
vs. } 6536. Assumpsit.
Kehlor Milling Company.

On motion of defendant, by Messrs. Orendorff and Creighton, its attorneys, leave is granted to file additional pleas.

And thereupon, to wit, on the day last aforesaid, came the defendant, by its attorneys, and filed its additional plea in said cause, which is in the words and figures following, to wit:

Additional Plea.

United States of America:

In the Circuit Court United States, Southern District of Illinois.

John T. Noye Manufacturing Co.
vs. } Assumpsit.
Kehlor Milling Company.

56 And for other and further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the several supposed causes of action in the said declaration mentioned are one and the same, and not different causes of action and that heretofore, to wit, on the 12th day of April, A. D. 1882, at, to wit, the district aforesaid, in consideration that the defendant would buy of the plaintiff, at its request, all the mill machinery, appliances, and materials necessary for the building and equipping of a roller mill, except the walls, steam-power, cleaning machinery, packers, and one railroad track-scale, for the grinding and manufacturing of flour

and other products from wheat and other grain, and would engage and employ the plaintiff to erect and construct said mill, and place all of said machinery, including said cleaning machinery, packers, and railroad track-scale, in position in said mill-house and mill at and for the price of forty-eight thousand five hundred dollars, the plaintiff promised, guaranteed, and warranted to it, the said defendant, that the said mill should be completed and ready for work by the 1st day of August, A. D. 1882; that when so built and constructed by said plaintiff it should have the capacity to manufacture six hundred barrels of flour from new wheat each and every day;
that the machinery, materials, and workmanship in and
57 about said mill furnished by said plaintiff should be first
class in every respect, and that said mill should combine all the latest improvements; that the product of said mill when so constructed and completed by plaintiff should be first-class grade in quality; that the yield produced by said mill when working should be one barrel of flour for every four bushels and thirty pounds of wheat used, and that said mill should be delivered to defendant in satisfactory running condition. And thereupon the defendant, confiding in and relying upon the said promises, guaranties, and warranties of the plaintiff, then and there contracted for and bought of said plaintiff the said mill machinery, materials, and appliances, and engaged and employed it, the said plaintiff, to construct and erect said mill, and to put all of said machinery in place in the defendant's mill-house, including said cleaning machinery, packers, and railroad track-scale, at and for the price of forty-eight thousand and five hundred dollars, and upon the consideration of said agreements, promises, warranties, and guaranties the defendant, before the commencement of this suit, had paid to the said plaintiff the sum of, to wit, forty thousand dollars. Yet the said plaintiff did not regard or keep its said promises, guaranties, and warranties, but thereby deceived and defrauded the defendant in this, to wit, that the said plaintiff did not construct and complete said mill or place
said machinery in position by the 1st day of August, 1882,
58 but that the same was never completed by said plaintiff ac-
cording to the terms of said contract; that the machinery, materials, and workmanship supplied and furnished by the said plaintiff under said contract were not first class in every particular, but were inferior in quality; that said plaintiff did not furnish and put in position all the machinery, materials, and appliances necessary and required for said mill; that the product of said mill was not first-class grade in quality, but was inferior in both grade and quality; that said mill did not contain or combine all the latest improvements, and was not delivered to defendant in satisfactory running condition; that said mill, when constructed by the said plaintiff, did not have a capacity to produce, and would not produce, six hundred barrels of flour per day from new wheat, but would not produce more than to wit, one hundred barrels of flour per day from new wheat, and said mill did not, and would not, produce a yield of one barrel of flour for every four bushels and thirty pounds of wheat, but would only produce, to wit, one barrel of flour for every five bushels of wheat.

Defendant says that on or about the 6th day of December, 1882, the said plaintiff, having failed as aforesaid to perform its said promises, guaranties, and warranties, wholly gave over any further 59 effort to perform the same, and quit and abandoned said mill, machinery, and appliances, at its place of construction in said district, to make the best use it could of said mill, machinery, materials, and appliances, and to overcome and remedy said defects and failures as best it could. Said defendant says that, by reason of said defects in said mill, machinery, and appliances, and the said breaches by said plaintiff of its said promises, guaranties, and warranties, said defendant was damaged to the extent of thirty thousand dollars by reason of the difference in value between said mill, machinery, materials, and appliances, as they were when abandoned by plaintiff as aforesaid, and the value which said mill, machinery, materials, and appliances would have had if said plaintiff had performed its said contract.

That, by reason of the said breaches of said contract, the said defendant was deprived of the use of said mill, machinery, materials, and appliances from, to wit, the 1st day of August, A. D. 1882, to the 2d day of June, 1883, to the defendant's damage in the sum of twenty thousand dollars.

That the said defendant, by reason of said breaches and failures on the part of said plaintiff to keep and perform its said promises, guaranties, and warranties, was compelled to, and did, before the commencement of this suit, expend large sums of money, 60 amounting to the sum of, to wit, fifteen thousand dollars, for new machinery, repairs, improvements, and labor, in and about putting said mill in condition, so it would manufacture flour in quantity and quality as specified in said contract.

That from, to wit, December 6th, 1882, to January 2d, 1883, said mill, machinery, and appliances were, by reason of said breaches of said contract, operated at great loss and damage to said defendant, in this, that there was and could only be manufactured forty thousand barrels of flour, when there should have been manufactured, to wit, one hundred and five thousand barrels of flour, and for the forty thousand barrels in fact manufactured there was required and used, to wit, five bushels of wheat for each barrel of flour, whereby the said defendant was damaged and lost by reason of the less quantity of flour manufactured during said period the sum of, to wit, twenty thousand dollars, and in the extra amount of wheat required to manufacture that which was in fact manufactured the said defendant was damaged in the sum of, to wit, fifteen thousand dollars; and said defendant was further damaged in the further sum of five thousand dollars by reason of the inferior quality of said flour.

Defendant says that the matters and things set forth herein arose out of the supposed causes of action mentioned in the plain- 61 tiff's declaration; and this the defendant is ready to verify.

Wherefore it prays judgment, &c., and that the same be recouped and set off against the demands of the plaintiff herein.

THE KEHLOR MILLING CO.,
By J. E. McKEIGHAN, *Its Att'y.*

(Endorsed:) Filed Feb'y 9, 1884. J. A. Jones, clerk.

And aftewards, to wit, on Thursday, the 14th day of February, at the term of court and in year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order Setting Cause for Trial.

John T. Noye Manufacturing Company
vs. } 6536. Assumpsit.
Kehlor Milling Company.

By consent of parties, by their attorneys, this cause is set for hearing on 28th inst.

62 And afterwards, to wit, on the 28th day of February, in the year last aforesaid, came the plaintiff, by its attorneys, and filed in said clerk's office its replications to defendant's pleas in said cause; which replications are in the words and figures following, to wit:

Replications.

United States of America, *Southern District of Illinois:*

Circuit Court of the United States for the Southern District of Illinois.

The John T. Noye Manufacturing Company, Plaintiff,
vs.
The Kehlor Milling Company, Defendant.

And the plaintiff, as to the plea of the defendant by it first above pleaded, and whereof it has put itself upon the country, does the like.

BRYAN & HATCH,
Pl'ff's Att'ys.

And the plaintiff, as to the plea of the defendant by it secondly above pleaded, says that it, the plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having its aforesaid action, because it says that it, the plaintiff, did not promise or guarantee to it, the defendant, in the manner and form as the defendant has above in that plea alleged. And this the plaintiff prays may be inquired of by the country, etc. 63

BRYAN & HATCH,
Pl'ff's Att'ys.

And defendant doth the like.

By J. E. McKEIGHAN, *Att'y.*

And the plaintiff, as to the plea of the defendant by it thirdly above pleaded, says that it, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having its aforesaid action, because it says that it, the plaintiff, did not promise or guarantee or warrant to it, the defendant, in manner and form as the defendant has above in that plea alleged. And this the plaintiff prays may be inquired of by the country, etc.

BRYAN & HATCH,
Pl'ff's Att'ys.

And defendant doth the like.

By J. E. McKEIGHAN, *Att'y.*

And the plaintiff, as to the plea of the defendant by it fourthly above pleaded, says that it, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having its aforesaid action, because it says that it, the plaintiff, did not promise or guarantee or warrant to it, the defendant, in manner and form as the defendant has above in that plea alleged. And this the plain-
64 tiff prays may be inquired of by the country, etc.

BRYAN & HATCH,
Pl'ff's Att'y.

And defendant doth the like.

By J. E. McKEIGHAN, *Att'y.*

And the plaintiff, as to the plea of the defendant by it fifthly above pleaded, says that it, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having its aforesaid action, because its say that it, the plaintiff, did not promise or agree or warrant in manner and form as the defendant has above in that plea alleged. And this the plaintiff prays may be inquired of by the country, etc.

BRYAN & HATCH,
Pl'ff's Att'ys.

And defendant doth the like.

By J. E. McKEIGHAN, *Att'y.*

And the plaintiff, as to the plea of the defendant by it sixthly above pleaded, says that it, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having its aforesaid action, because its says that it, the plaintiff, was not nor is indebted to the defendant in any manner and form, as the defendant has above in that plea alleged. And this the plaintiff prays may be inquired of by the country, etc.

BRYAN & HATCH,
Pl'ff's Att'ys.

65 And defendant doth the like.

By J. E. McKEIGHAN, *Att'y.*

And the plaintiff, as to the plea of the defendant by it seventhly above pleaded, says that it, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, becauase it says that it, the plaintiff, did not promise or guarantee or warrant to it, the said defendant, in the manner and form as the defendant has above in that plea alleged. And this the plaintiff prays may be inquired of by the country, etc.

BRYAN & HATCH,
Pl'ff's Att'ys.

And defendant doth the like.

By J. E. McKEIGHAN, *Att'y.*

And the plaintiff, as to the plea of the defendant by it secondly above pleaded, says that it, the plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having its aforesaid action, because it says that the said mill was completed by August 1st, 1882; that the material and workmanship was first class in every particular; that said machinery and mill was completed and combined all of the latest improvements, and was delivered by the plaintiff to the defendant in satisfactory running condi-
66 tion; that said mill had a capacity to produce six hundred
barrels of flour per day from new wheat; that such product was first class in grade and in quality; that of the product of the mill twenty-five per cent. was patent flour, equal in grade to any patent flour made in St. Louis or vicinity, twelve per cent. low grade flour, and seven per cent. of which low grade was family flour, and and the balance of said low grade flour was equal to extra St. Louis inspection, and that the balance of the product was bakers' flour, equal in grade to any baker's flour made in St. Louis or vicinity; and that the yield of flour was equal to the yield of any roller mill, and was not less than one barrel of flour for every four bushels and thirty pounds of wheat used in its manufacture. And this the plaintiff prays may be inquired of by the country, etc.

BRYAN & HATCH,
Pl'ff's Att'ys.

And defendant doth the like.

By J. E. McKEIGHAN, *Att'y.*

And the plaintiff, as to the plea of the defendant by it thirdly above pleaded, says that it, the plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having its aforesaid action, because it says that the said mill was completed August 1st, 1882, and that it had a capacity to manufacture six hundred
barrels of flour from new wheat per day, and that the
67 machinery, material, and workmanship furnished by said
plaintiff was first class in every respect, and that they combined all of the latest improvements, and that the product of said mill was first class in quality; that said mill was completed and delivered to defendant in satisfactory running condition. And this the plaintiff prays may be inquired of by the country, etc.

BRYAN & HATCH,
Pl' ff's Att'ys.

And defendant doth the like.

By J. E. McKEIGHAN, *Att'y.*

And the plaintiff, as to the plea of the defendant by it fourthly above pleaded, says that it, the plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having its aforesaid action, because it says that said mill, machinery, materials, and work was first class in every respect; that it combined all of the latest improvements; that the said mill was so built and constructed, and the machinery and appliances so placed in position; that the said mill, when completed, had a capacity to produce six hundred barrels of flour from new wheat per day of first-class grade and quality; and that of the said product twenty-five per cent. was patent flour equal to any patent flour made in St. Louis or vicinity; twelve per cent. low-grade flour, seven per cent. of which low
68 grade flour was family flour, and the balance of said low grade extra St. Louis inspection, and that the balance of said flour so manufactured was bakers' flour, equal in quality to any bakers' flour made in St. Louis or vicinity; and that the mill was so constructed and completed, and did yield equal to any roller mill, and yielded one barrel of flour for every four bushels and thirty pounds of wheat used in its manufacture. And this the plaintiff prays may be inquired of by the country, etc.

BRYAN & HATCH,
Pl'ff's Att'ys.

And defendant doth the like.

By J. E. McKEIGHAN, *Att'y.*

And the plaintiff, as to the plea of the defendant by it fifthly above pleaded, says that it, the plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having its aforesaid action, because it says that the said mill, machinery, and materials, and the work of putting the same in position, was first-class in every respect; that it combined all of the latest improvements; that it was so built and constructed that its product was first-class grade in quality, and that the mill was so erected and constructed as to have a capacity of six hundred barrels of flour from new wheat per day. And this the plaintiff prays may be inquired of by the country, etc.

BRYAN & HATCH,
Pl'ff's Att'ys.

69 And defendant doth the like.

By J. E. McKAIGHAN, *Att'y.*

And the plaintiff, as to the plea of the defendant by it seventhly above pleaded, says that it, the plaintiff, ought not, by reason of anything in that plea alleged, be barred from having its aforesaid action, because it says that said mill was completed and ready for work August 1st, 1882, and that it had a capacity to manufacture six hundred barrels of flour from new wheat per day; that the machinery, materials, and workmanship were first-class in every respect, and that said mill combined all of the latest improvements, and that the product of said mill was first-class grade in quality; that the yield of said mill was one barrel of flour for every four bushels and thirty pounds of wheat, and that said mill was delivered to defendant in satisfactory running condition. And this the plaintiff prays may be inquired of by the country, etc.

BRYAN & HATCH,
Pl'ff's Att'ys.

And defendant doth the like.

By J. E. McKEIGHAN, *Att'y.*

(Endorsed:) Filed February 28, A. D. 1884. J. A. Jones, cl'k.

70 And afterwards, to wit, on Friday, the 29th day of February, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order Postponing Trial.

JOHN T. NOYE MANUFACTURING COMPANY
vs.
KEHLOR MILLING COMPANY.
} 6536. Assumpsit.

By consent of parties, by their attorneys, the hearing of this cause is postponed until the 3d day of March next.

And afterwards, to wit, on Monday, the 3d day of March, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Trial & Continued.

JOHN T. NOYE MANUFACTURING COMPANY
vs.
KEHLOR MILLING COMPANY.
} 6536. Assumpsit.

71 This day comes as well the plaintiff, by Azel F. Hatch, Esq., its attorney, as the defendant, by John H. McKeighan, Esq., and Messrs. Orendorff and Creighton, its attorneys, and the issue being joined, whereupon comes a jury of good and lawful men, to wit, D. T. Cleveland, Abram Allen, William Laveiy, C. B. Warren, W. F. Clifford, Harry Fager, W. A. Mitchell, Nicholas Dubois, Thomas York, John B. Reed, John L. Doyle, and W. T. Prunty, duly elected, tried, and sworn to try said issue, and having the evidence in part, the further trial of this cause is postponed until to-morrow morning.

And afterwards, to wit, on Tuesday, the 4th day of March, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Continuance of Trial.

John T. Noye Manufacturing Company
vs. 6536. Assumpsit.
Kehlor Milling Company.

This day come again the parties, by their attorneys, and also the jury impanneled and sworn herein, and after hearing additional evidence, the further trial of this cause is postponed until to-morrow morning.

72 And afterwards, to wit, on Wednesday, the 5th day of March, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Continuance of Trial.

John T. Noye Manufacturing Company
vs. 6536. Assumpsit.
Kehlor Milling Company.

This day come again the parties, by their attorneys, and also the jury impanneled and sworn herein; and, after hearing additional evidence, the further trial of this cause is postponed until to-morrow morning.

And afterwards, to wit, on Thursday, the 6th day of March, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Continuance of Trial.

John T. Noye Manufacturing Company
vs. 6536. Assumpsit.
Kehlor Milling Company.

73 This day come again the parties, by their attorneys, and also the jury impanneled and sworn herein; and, after hearing the remainder of the evidence, the further trial of this cause is postponed until to-morrow morning.

And afterwards, to wit, on Friday, the 7th day of March, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Conclusion of Trial

John T. Noye Manufacturing Company
vs. 6536. Assumpsit.
Kehlor Milling Company.

This day come again the parties, by their attorneys, and also the jury impanneled and sworn herein, who, after hearing the argument of counsel and receiving the instructions of the court, retire to consider of their verdict.

74 And afterwards, to wit, on Saturday, the 8th day of March, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Verdict and Judgment for Plaintiff.

JOHN T. NOYE MANUFACTURING COMPANY
vs.
KEHLOR MILLING COMPANY.
} 6536. Assumpsit.

This day come again the parties, by their attorneys, and also the jury impanneled and sworn herein, who, for verdict, say: "We, the jury, find the issue for the plaintiff and assess its damages to the sum of nine thousand one hundred and eighty-eight dollars and ninety-eight cents."

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of nine thousand one hundred and eighty-eight dollars and ninety-eight cents, its damages aforesaid assessed by the jury, together with the sum of two hundred and seventy-four dollars and ninety cents, its costs and charges by it about its suit in this behalf expended, and that execution issue therefor. And it is also ordered by the court that the plaintiff have special execution for the sale of the property attached, to wit: Lots three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), and eleven (11) of block (8) of Ferry's division of East St. Louis, in the county of St. Clair and State of Illinois.

75 And afterwards to wit, on Monday, the 10th day of March, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Motion for New Trial.

JOHN T. NOYE MANUFACTURING COMPANY
vs.
KEHLOR MILLING COMPANY.
} 6536. Assumpsit.

This day comes the defendant, by Messrs. Orendorff and Creighton and John H. McKeighan, Esq., its attorneys, and enters its motion for a new trial herein.

And afterwards, to wit, on the 28th day of March, in the year last aforesaid, came the defendant, by its attorneys, and filed its reasons on motion for new trial, which are in the words and figures following, to wit:

Reasons on Motion for New Trial.

In the United States Circuit Court, Southern District, Illinois.
January Term, 1884.

JOHN T. NOYE MANUFACTURING CO.
vs.
KEHLOR MILLING CO.
} Assumpsit.

76 And now comes the defendant, by McKeighan & Orendorff & Creighton, its attorneys, and moves the court to grant a new trial herein for the following reasons, viz:

1st. The verdict returned by the jury was contrary to the evidence.

2d. The verdict of the jury was inconsistent with and contrary to the preponderance of the evidence.

3d. The verdict was inconsistent and excessive and not supported by the evidence.

Lastly. The verdict was contrary to the law and the evidence.

McKEIGHAN &
ORENDORFF & CREIGHTON,
Att'ys for Defendant.

(Endorsed:) Filed March 28th, A. D. 1884. J. A. Jones, clerk.

And on, to wit, the day last aforesaid (being Friday, ——, and at the term of court, and in the year last aforesaid,) the following further proceedings were had in said court, in said cause, and entered of record, to wit:

Order Setting Motion for New Trial for Hearing.

JOHN T. NOYE MANUFACTURING COMPANY
vs.
KEHLOR MILLING COMPANY.
} 6536. Assumpsit.

77 By consent of parties, by their attorneys, the hearing of motion for new trial heretofore entered by defendant is set for hearing on Friday, the 4th day of April next.

And afterwards, to wit, on Friday, the 4th day of April, at the term of court, and in the year last aforesaid, the following further proceedings were had in said court, in said cause and entered of record, to wit:

Order Overruling Motion for New Trial and Allowing Writ of Error.

JOHN T. NOYE MANUFACTURING COMPANY
vs.
KEHLOR MILLING COMPANY.
} 6536. Assumpsit.

This day this cause came on to be heard upon motion of defendant for a new trial herein, and the court having heard argument of counsel, and being sufficiently advised in the premises, overruled said motion.

And thereupon the defendant prays a writ of error to the Supreme

Court of the United States, which is allowed, on its entering into
bond to the plaintiff, with good and sufficient security, to be approved
by the court and conditioned as the law directs, in the penalty of
twelve thousand dollars, in sixty days from this date; de-
78 fendant is also to have sixty days in which to tender a bill of
exceptions.

And afterwards, to wit, on the 3d day of June, in the year last aforesaid, came the defendant, by its attorneys, and presented its bill of exceptions, which was signed by the judge and ordered to be filed; and also, on said date, filed its bond on writ of error in said cause; which said bill of exceptions and bond are in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, } *ss:*
State of Illinois, }

In Circuit Court, Southern District of Illinois. January Term, A. D. 1884.

KEHLOR MILLING COMPANY }
ats. } Assumpsit.
JOHN T. NOYE MANUFACTURING COMPANY. }

Be it remembered that on the trial of this cause, in this term, the plaintiff gave in evidence on its part and behalf as follows, that is to say:

a. Testimony of Richard K. Noye.

RICHARD K. NOYE, being duly sworn, testified: My name is
Richard K. Noye; I am acquainted with the plaintiff, John T.
79 Noye Manufacturing Company; it is a corporation organized
and doing business under and by virtue of the laws of the
State of New York, and was, prior to, at the time, and ever since the bringing of this suit has been, a citizen and resident of the State of New York; I also am acquainted with the defendant, The Kehlor Milling Company; it is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, and was, prior to and at the time of commencing of this suit, a citizen and resident of the State of Missouri. The John T. Noye Manufacturing Company succeeded to the business of John T. Noye and Sons, and, by and with the consent of the defendant, undertook to, and did, do and perform and carry out the agreement made by the defendant with John T Noye & Sons, a memorandum of which agreement was reduced to writing and signed by the parties, and is in the words and figures following:

b. Agreement between John T. Noye & Sons and Kehlor Milling Co.

"BUFFALO, N. Y., *April 12th*, 1882.

"D. M. KEHLOR, Esq.

"DEAR SIR: We propose to furnish you with mill machinery for the new Kehlor mill, and to place the same in position substantially as described in conversation to-day, for the sum of $48,500.00, contract to be drawn up detailing all particulars.

"JOHN T. NOYE & SONS.

"Accepted by—
"D. M. KEHLOR
"For KEHLOR MILLING CO."

80 The plaintiff gave in evidence further testimony tending to prove the issues on its behalf, and defendant gave in evidence testimony tending to prove the issues on its behalf.

The case was submitted to the jury without instructions from the court, and thereupon the jury rendered a verdict against the defendant, whereupon the defendant, by its counsel, then and there moved the court to set aside the verdict so rendered and grant a new trial of this cause; but the court denied the motion and gave judgment on the verdict against the defendant; to which decision of the court in denying such motion the defendant, by its counsel, then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record the defendant tenders this bill of exceptions, and prays that the same may be signed and sealed by the judge of this court pursuant to the law in such case; which is accordingly done this 3d day of June, A. D. 1884.

S. H. TREAT, [L. S.]
District Judge.

(Endorsed:) Filed June 3d, 1884. J. A. Jones, clerk.

Bond on Writ of Error.

Know all men by these presents, that we, Kehlor Milling Company, as principal, and J. C. M. Kehlor, C. H. Beers, are held 81 and firmly bound unto The John T. Noye Manufacturing Company in the full and just sum of twelve thousand dollars, to be paid to the said John T. Noye Manufacturing Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 3d day of June, 1884, in the year of our Lord thousand eight hundred and eighty-four.

Whereas lately, at the January term, 1884, A. D., of the circuit court of the United States for the southern district of Illinois, in a suit depending in said court between the said John T. Noye Manuacturing Company, as plaintiff, and the said Kehlor Milling Company, defendant, judgment was rendered against the said Kehlor Milling Company for the sum of nine thousand one hundred and eighty-eight $\frac{98}{100}$ dollars, and the said Kehlor Milling Company having sued out a writ of error out of the Supreme Court of the United States to reverse the said judgment in the aforesaid suit, and a citation directed to the said John T. Noye Manufacturing Company, citing and admonishing it to be and appear at a Supreme Court of the

United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said Kehlor Milling Company shall prosecute said writ to 82 effect, and answer all damages and costs if it shall fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] KEHLOR MILLING CO., [SEAL.]
By J. C. M. KEHLOR, *P't.* [SEAL.]
J. C. M. KEHLOR. [SEAL.]
C. H. BEERS. [SEAL.]

Approved by—
S. H. TREAT, *Dist. Judge.*
June 3d, 1884.

(Endorsed:) Filed 3d day of June, 1884. J. A. Jones, clerk.

83 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Illinois, }

In Circuit Court for said District.

I, John A. Jones, clerk of the circuit court of the United States within and for the southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and the proceedings thereon had (being a complete transcript) in a certain cause lately pending in said court, wherein The John T. Noye Manufacturing Company was plaintiff and The Kehlor Milling Company was defendant, as fully as the same appear on file and of record in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Springfield, in said district, this 13th day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and ninth year.

[SEAL.] J. A. JONES, *Clerk.*

84 *Citation.*

Supreme Court of the United States.

The United States of America to the John T. Noye Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein The Kehlor Milling Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties aforesaid in that behalf.

Witness the Hon. Samuel H. Treat, district judge of the United States for the southern district of Illinois, at Springfield, in said district, this twentieth day of June, in the year of our Lord 1884, and of our Independence the 108th year.

S. H. TREAT,
District Judge United States for Southern District of Illinois.

We hereby acknowledge service of the above citation this 24th day of June, A. D. 1884.

THE JOHN T. NOYE MANUFACTURING COMPANY,
By BRYAN & HATCH, *Its Attorneys.*

[Endorsed:] Supreme Court of the United States. The Kehlor Milling Company, plaintiff in error, *vs.* John T. Noye Manufacturing Co. Citation.

85 In the Supreme Court of the United States. October Term, 1884.

KEHLOR MILLING COMPANY, Pl'ff in Error,
vs.
JOHN T. NOYE MANUFACTURING COMPANY, Defendant in Error.

Now comes the said plaintiff in error before the justices of the Supreme Court of the United States, by J. E. McKeighan, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The court erred in the admission of testimony at the trial and in excluding testimony offered by plaintiff in error.

2nd. The court erred in overruling the motion for a new trial.

3rd. The court erred in overruling the motion in arrest of judgment.

4th. The record does not sustain the judgment.

5th. The judgment is for the defendant in error, when,
86 by the law of the land, it should be for the plaintiff in error.

And the said plaintiff in error prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught. and that it may be restored to all things which it hath lost by occasion of said judgment.

J. E. McKEIGHAN,
Att'y for Pl'ff in Error.

[Endorsed:] In Supreme Court of United States. Assignment of errors. J. E. McKeighan, for pl'ff in error.

Endorsed on cover: S. Illinois C. C. U. S. No. 1110. The Kehlor Milling Company, plaintiff in error, *vs.* The John T. Noye Manufacturing Company. Filed 17th October, 1884.

122-652

Office Supreme Court U. S.
FILED.
MAR 21 1886
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

THE KEHLOR MILLING COMPANY,
Plaintiff in Error,

vs.

THE JOHN T. NOYE MANUFACTURING COMPANY,
Defendant in Error.

No. 1110.

BRIEF OF PLAINTIFF IN ERROR ON MOTION OF DEFENDANT IN ERROR TO DISMISS AND AFFIRM.

The motion of defendant in error ought not to prevail.

1. The motion is made under Rule 6 of this court. The rule does not authorize the court to entertain it. The judgment in the court below was for $9,188.98, which gives this court jurisdiction. No complaint is made of the regularity of the proceedings in error.

There is, therefore, no color for the motion to give this court the right to consider the merits of the case, or to pass judgment on the motives of the appeal.

Whitney *v.* Cook, 9 Otto, p. 607.

This court will not dismiss an appeal, or writ of error, on motion, even though the court should deem the appeal to have been taken for delay only. Both parties have a right to be heard.

Armory *v.* Armory, 1 Otto, p. 356.

Relying upon the cases cited as furnishing the principles applicable to the decision of this motion, I deem it improper to suggest anything on the merits of the case. They will be considered when the case is reached for hearing, and counsel may not find the record so barren of points, or that every assignment of error has been made which can be under the rules in the brief, as they would now have the court believe.

It is respectfully submitted that the motion should be denied.

J. E. McKEIGHAN,
Attorney for Plaintiff in Error.

122-652

FILED
MAR 23 1885
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT of the UNITED STATES,

(No. 1110.)

THE KEHLOR MILLING COMPANY,
Plaintiff in Error,
vs.
THE JOHN T. NOYE MANUFACTURING COMPANY,
Defendant in Error.

Brief of Defendant in Error on Motions to Dismiss and Affirm.

The defendant in error in the above entitled cause, by Azel F. Hatch, its attorney, moves the court to dismiss the writ of error in said cause, and to affirm the judgment of the Circuit Court in said cause, because it is manifest, from inspection of the record, that the writ of error was taken for delay only. For the same reason defendant in error asks that damages may be awarded it, according to the twenty-third rule of this court.

STATEMENT OF THE CASE.

This is an action in assumpsit, brought by the John T. Noye Manufacturing Company, a corporation, a citizen of New York, against the Kehlor Milling Company, a corporation, a citizen of Missouri, to recover the unpaid balance due for material and machinery sold and delivered and labor performed in furnishing a flouring mill, owned by the Kehlor Milling Company, at East St. Louis, Illinois.

The declaration was upon the common counts *(Record, p. 13)*, and an itemized copy of the account sued on was filed therewith. The defendant, now the plaintiff in error, was served and appeared by its attorney and filed pleas of general issue, set off, breach of warranty and failure of consideration, in all seven pleas. *(Record. pp. 35 to 61.)* Replications to the several pleas were filed and issue joined. *(Record, p. 62.)* The case was set down for hearing by consent of parties and was tried before a jury. *(Record, pp. 70 and 71.)*

The jury found the issue for defendant in error and assessed its damages at $9,188.98, for which amount and costs judgment was entered. *(Record, p. 74.)* Subsequently the plaintiff in error filed its motion for a new trial *(Record, p. 76)*, assigning reasons which I shall consider hereafter.

The court denied the motion for a new trial, and the plaintiff in error excepted. *(Record, p. 80.)* This is the only exception appearing in the record.

The plaintiff in error brings the case to this court by writ of error, and assigns the following errors, viz.:

" *First*—The court erred in the admission of testi-
" mony at the trial, and in excluding testimony offered by
" plaintiff in error.

" *Second*—The court erred in overruling the motion
" for a new trial.

" *Third*—The court erred in overruling the motion in
" arrest of judgment.

" *Fourth*—The record does not sustain the judgment.

" *Fifth*—The judgment is for the defendant in error,
" when, by the law of the land, it should be for the plain-
" tiff in error."

BRIEF.

No motion in arrest of judgment was made. No exception was taken to the admission of testimony, and no testimony offered was excluded. No instructions were asked by either party and none were given by the court. *(See Bill of Exceptions, Record, pp. 79 and 80.)*

The only exception appearing in this record is to the order overruling the motion for new trial. That motion was in the following words (*Record, p. 76*): " And now
" comes the defendant by McKeighan and Orendorff &
" Creighton, its attorneys, and moves the court to grant
" a new trial herein, for the following reasons, viz:

" *First*—The verdict returned by the jury was con-
" trary to the evidence.

" *Second*—The verdict of the jury was inconsistent
" with and contrary to the preponderance of the evidence.

" *Third*—The verdict was inconsistent and excessive,
" and not supported by the evidence.

" *Lastly*—The verdict was contrary to the law and " the evidence."

No point has been more repeatedly and authoritatively settled, than that this court will not on writ of error revise or give judgment as to the facts, but takes them as found by the court below.

Penhallow v. *Doane*, 3 Dall. 102.
Wiscart v. *Dauchy*, 3 Dall. 327.
Jenning v. *Thomas*, 3 Dall. 336.
Talbot v. *Seaman*, 1 Cranch, 38.
Faw v. *Roberdean*, 3 Cranch, 177.
Dunlop v. *Munroe*, 7 Cranch, 270.
United States v. *Casks of Wine*, 1 Pet. 550.

If the evidence were before the court, it would not be competent for them to reverse the judgment for any error in the verdict of the jury.

Parsons v. *Bedford*, 3 Peters, 449.

No question of law can be brought before this court on this record.

As it appears that this writ of error was sued out for delay, the defendant in error asks that the writ of error be dismissed, and the judgment of the court below affirmed, with costs, and that damages may be awarded it, according to the twenty-third rule of this court.

AZEL F. HATCH,
Attorney for defendant in error.